Case No. D24/19

Profits tax – correction of profits tax return under section 70A of the Inland Revenue Ordinance – 'Profits Tax Return – Fair Value Accounting' section of the Department's website – whether the loss is deductible from the taxpayer's assessable profits – whether such 'error' in the tax computation was within the meaning of section 70A of the Ordinance

Panel: Anson Wong SC (chairman), Law Chung Ming Lewis and Wong Ng Kit Wah Cecilia.

Date of Hearing: 4 May 2017.
Date of Decision: 16 March 2020.

The taxpayer is a limited company. The taxpayer appealed against the determination of the Commissioner of the Inland Revenue Department in which the Commissioner refused the taxpayer's application under section 70A of the Inland Revenue Ordinance for the correction of its profits tax return for the year of assessment.

The taxpayer sought to appeal against the Determination on the following grounds:- (1) There was an 'arithmetic error' in the tax computation of which the loss of forward contract should be included in the tax computation; (2) Given that the taxpayer had paid tax on the gain made in respect of similar forward contracts in the previous years of assessment, the loss on the forward contracts in question should be tax deductible. Disallowing the deduction of the loss in inconsistent and unreasonable; (3) Under the 'Profits Tax Return – Fair Value Accounting' section of the Department's website, it was expressly stated that the Department accepted assessable profits computed on a fair value basis. In the Financial Statements, the auditors made it clear in their qualified opinion that 'had the forward contracts been stated at fair value, the taxpayer would have recognized an unrealized loss in the statement of income and retained earnings for the year.

The two issues involved in the appeal are: (1) whether the loss is shown to be deductible from the taxpayer's assessable profits; (2) If 'yes', whether such 'error' in the Tax Computation was such 'error' within the meaning of section 70A of the Ordinance?

Held:

1. For the taxpayer to claim deduction based on the Loss, there must be evidence showing that such changes are 'material and likely to be permanent'. Although the generally accepted commercial accounting may be relevant for this purpose, its assistance is limited. At the end of the day, the taxpayer has to satisfy this Board with evidence that the Loss was material and likely to be permanent at the year of assessment (Nice Cheer Investment Ltd v Commissioner of Inland Revenue (2013) 16 HKCFAR

813 followed).

2. On the question as to whether the Loss, being the fair value changes of the forward contracts, is deductible, the crux is whether in this appeal, the taxpayer has adduced sufficient evidence to discharge its burden to show that such fair value changes were 'material and likely to be permanent' in the year of assessment.

3. The contents of the 'Profits Tax Return – Fair Value Accounting' section of the Department's website was only an 'administrative measure' of the Department at the time. It does not change the law as laid down by the Court of Final Appeal in Nice Cheer as to what is required to be shown before an unrealized loss can be treated as deductible loss for the purpose of our tax law. Secondly. As an 'administrative measure', it gave a taxpayer an option to compute his assessable profits on a fair value basis. This, however, does not mean that a taxpayer who had submitted a tax computation on realization basis could claim that such tax computation was an error and, on that basis, seek deduction of such unrealized loss that was not permissible by our tax law.

4. The Board is of the view that the taxpayer is unable to discharge its burden to show that the loss is deductible from the taxpayer's assessable profits for the year of assessment and it therefore is unable to show any 'error' to support its application under section 70A of the Ordinance.

5. For a taxpayer to succeed in re-opening an assessment under section 70A of the Ordinance, he has to adduce evidence to show that there was an 'error or omission', which was 'something incorrectly done through ignorance or inadvertence', but not 'a deliberate act in the sense of a conscientious choice of one out of two or more courses' (Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218 followed).

6. Even if the Loss is deductible from the taxpayer's assessable profits for the year of assessment, this Board is of the view that the taxpayer has failed to discharge its burden to show that there was such 'error or omission' justifying the re-opening of the assessment under section 70A of the Ordinance.

7. Since this appeal has no merit in it and the taxpayer has also failed to provide this Board with relevant evidence in support of this appeal, this Board consider appropriate to exercise its discretion to order the taxpayer to pay $10,000 as costs of the Board.

Appeal dismissed and costs order in the amount of $10,000 imposed.

Cases referred to:

Extramoney Ltd v Commissioner of Inland Revenue [1997] HKLRD 387
Nice Cheer Investment Ltd v Commissioner of Inland Revenue (2013) 16 HKCFAR 813
Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218

Ng Yu Wai, for the Appellant.
Fu Hoi Kong and Lau Wai Sum, for the Commissioner of Inland Revenue.

Decision:

A. Introduction

1. The taxpayer (the 'Taxpayer') is a limited company which, at the material time, was engaged in the business of the trading of garments.

2. In this appeal, the Taxpayer appeals against the determination of the Commissioner of the Inland Revenue Department (the 'Commissioner') dated 27 June 2016 (the 'Determination') in which the Commissioner refused the Taxpayer's application under section 70A of the Inland Revenue Ordinance (the 'Ordinance') for the correction of its profits tax return for the year of assessment 2014/15 (the 'Return').

B. Factual Background

3. The relevant background of this appeal is set out in paragraphs 1(1) to 1(16) of the Determination. At the hearing of the appeal, the Taxpayer's representative confirmed that the Taxpayer would not dispute the factual matters stated in the aforesaid paragraphs of the Determination.

4. The factual matters giving rise to this appeal can be summarised as follows:

(1) The Taxpayer is a limited company incorporated in Hong Kong in June 2009 and had been engaged in the principal activity of trading of garments. It had made accounts annually on 31 December since 2010.

(2) On 12 August 2015, the sole director of the Taxpayer, one Ms A, approved the financial statements of the Taxpayer for the year ended 31 December 2014 (the 'Financial Statements'), which were audited by Company B. The relevant auditor's report included the following basis for qualified opinion:

'**The Company did not recognise the fair value of all forward contracts outstanding at year end in the statement of financial position**, which constitutes a departure from section 12 of the Hong Kong Financial Reporting Standard for Private Entities "Other Financial Instruments Issues" to measure all derivative financial instruments at fair value in the statement of financial position and recognise changes in fair value in the statement of income and retained earnings. The Company's records indicate that had the forward contracts been stated at fair value, the Company would have recognised an unrealised loss of HK$13,025,735 in the statement of income and retained earnings for the year, assets and liabilities would have been increased by HK$829,900 and HK$13,855,635 respectively as at 31 December 2014. The effect would have been to reduce profit before and after tax for the year; and net assets at 31 December 2014 by HK$13,025,735.' (emphasis added)

(3) On 17 August 2015, the Taxpayer through Company B, who acted as its authorised representative, submitted the Return together with the Financial Statements and tax computation for the year ended 31 December 2014 (the 'Tax Computation'). In the Financial Statements, which were approved by Ms A, the Taxpayer made a provision of Hong Kong Profits Tax in the sum of $630,408. In the Return, the Taxpayer declared Assessable Profits of $3,941,867, which were inclusive of the gain on forward contract investment recognized under the '*Other income*' in the Financial Statements.

(4) On 8 September 2015, the Assessor raised on the Taxpayer the following Profits Tax Assessment for the year of assessment 2014/15 (the 'Assessment') in accordance with the Return:

Assessable Profits	$3,941,867
Tax Payable thereon	$630,408

The relevant notice of assessment (the 'Notice') was sent by post to the Taxpayer at its registered office and principal place of business, with a copy to Company B. There was no record of non-delivery of the Notice or copy thereof.

(5) By a letter dated 20 November 2015, Ms A checked the assessment status of the Taxpayer for the year of assessment 2014/15. In reply, the Assessor sent a copy of the Notice by post to the Taxpayer at its registered office on 2 December 2015.

(6) By a letter dated 15 December 2015 (the 'December 2015 Letter'), the Taxpayer, through a new tax representative (i.e. Hong Kong Anxian Yuan Holdings Limited ('Anxian')), objected to the

Assessment claiming that there was a material error in the profits for the year of assessment of 2014/15, as a result of fair value changes on its forward contracts outstanding at the year end. The December 2015 Letter stated, *inter alia*, as follows:

'There was a material error of the profits for the year of assessment 2014/15 resulted from the forward contracts outstanding. As stated in the qualified opinion of the audited report of the Company for the year [ended on] 31 December 2014, '*had the forward contracts been stated at fair value, the Company would have recognised an unrealised loss of HK$13,025,735 in the statement of income and retained earnings for the year*'. The management of the Company intended to make a provision of the income statement of the same amount ($13,025,735) as such loss had been recognized on the date of issuance of the auditor's report. At the time of the issuance of audit report, the Company management and its auditor were in dispute regard whether to state the forward contract at fair value or to make a provision. **Given the pressing time pressure of tax deadline, the Company, without insisting the tax representative to correct the accounts to provide the loss in relation to the forward contracts, submits the return to meet the tax deadline. It was intended that after receiving an assessment from IRD, the Company would appoint a new tax representative to lodge an objection on the assessment.**' (emphasis added)

(7) The revised tax computation for the year of assessment 2014/15 attached to the December 2015 Letter showed the following particulars:

(a) Revised tax computation

	$
Profit per return	3,941,867
Less: Unrealised loss on forward contract (the 'Loss')	13,025,735
Adjusted Loss	(9,083,868)

(b) Analysis of the Loss

	Unrealised gain	*Unrealised loss*
Bank C, Hong Kong Branch	-	(1,430,488.18)
Bank D	315,499.99	(12,425,147.17)
Banking Group E (management estimation)	514,399.93	-

(8) Copies of the following documents were also attached to the December 2015 Letter:

(a) A letter of 31 July 2015 issued to the Taxpayer by Team C1 on behalf of Bank C, Hong Kong Branch showing the revaluation prices for eight contracts as of 31 December 2014. All of the

eight contracts, with expiry dates ranging from 17 August 2015 to 18 April 2016, were described as 'Strip of CNY Bullish'.

(b) A Customer Valuation Statement dated 5 August 2015 issued to the Taxpayer by Bank D showing the mark-to-market values for six contracts as of 31 December 2014. There were only two contracts with negative mark-to-market value. The two contracts with expiry dates in 2016 were classified under the category of 'FXO'.

(9) By a letter dated 29 December 2015, the Assessor informed the Taxpayer that she could not accept the December 2015 Letter as a valid notice of objection under section 64 of the Ordinance because it was not received within one month after the date of the Notice. Moreover, she was not satisfied that the Taxpayer had been prevented from lodging an objection in time owing to absence from Hong Kong, sickness or other reasonable cause. The Assessment must be regarded as final and conclusive in terms of section 70 of the Ordinance.

(10) By a letter dated 8 January 2016, the Taxpayer, through its solicitors Messrs Li, Wong, Lam & WI Cheung (the 'Solicitors'), made an application under section 70A of the Ordinance to correct the Assessment on the grounds that:

'1. There was a material error of the profits for the year of assessment 2014/2015. Should appropriate provision be made regarding the forward contracts, the assessable profits wouldave [sic] been reduced by HK$13,025,735. As a result, the Company would have an adjusted loss of HK$9,083,868.

2. Our client lodged an objection through its tax representative, Anxian, on 15 December 2015 which is well within 6 months period after the date of your assessment was served on 8 September 2015 and also well within 6 years after end of year of assessment 2014/2015.'

(11) The Assessor opined that the exclusion of the Loss was a deliberate decision taken by the Taxpayer when submitting the Return, and that there was no error or omission in the Return according to the High Court judgment in Extramoney Ltd v CIR [1997] HKLRD 387. By a letter dated 12 February 2016, she explained her views and invited the Taxpayer to comment on why and how it made an error in submitting the Return in light of the decision in Extramoney.

(12) By a letter dated 24 February 2016 from the Solicitors, the Taxpayer argued that the ruling in Extramoney is irrelevant. It was stated,

amongst other things, that:

(a) The fundamental question was whether the Loss was tax deductible. The Taxpayer had paid Profits Tax on the gain on forward contract investment of $743,808 and $696,826 for the years of assessment 2012/13 and 2013/14 respectively. If the gain was taxable, it would follow that the loss on similar forward contracts should be tax deductible. Disallowing the tax deduction of the Loss, which arose from forward contract investment, was inconsistent and unreasonable.

(b) Under the 'Profits Tax Return – Fair Value Accounting' section on the website of the Inland Revenue Department (the 'Department'), it was explicitly stated that the Department accepted Assessable Profits computed on a fair value basis. Subject to the Court of Final Appeal decision in Nice Cheer Investment Ltd v CIR (2013) 16 HKCFAR 813, the Department concluded that provision for loss based on fair value was deductible from Assessable Profits.

(c) Thus, the Taxpayer has full rights to re-compute the Assessable Profits using the fair value basis, and deduct the Loss from its Assessable Profits. The Taxpayer urged the Department to accept the revised tax computation because that tax computation was correct and was made within the time limits laid down in section 70A of the Ordinance.

(13) The contents of the 'Profits Tax Return – Fair Value Accounting' section on the website of the Department are as follows:

'Subsequent to the judgment of the Court of Final Appeal in Nice Cheer Investment Limited v CIR, the Department has agreed as an interim administrative measure while pending review, to accept 2013/14 profits tax returns in which the assessable profits are computed on a fair value basis.

The Department is prepared to extend the interim administrative measure to the filing of 2014/15 profit tax returns while pending completion of review. That is, the Department agrees to accept the 2014/15 returns in which assessable profits are computed on a fair value basis.

Similarly, the Department agree to re-compute the 2014/15 assessable profits computed on a fair value basis if the taxpayer subsequently adopts the realization basis. However, any request for re-computation should be made within the time limits laid down in sections 60 or 70A of the Inland Revenue Ordinance.'

(14) The Assessor was not satisfied that the Profits Tax charged on the Taxpayer for the year of assessment 2014/15 was excessive by reason of errors or omissions as prescribed by section 70A of the Ordinance. By a letter dated 7 April 2016, the Assessor refused the Taxpayer's application for correction of the Assessment.

(15) On behalf of the Taxpayer, the Solicitors objected to the Assessor's refusal to correct the Assessment under section 70A of the Ordinance claiming that there was an error in the Return, and that disallowing the Taxpayer's claim to correct the Assessment, which was based on an incorrectly calculated profit and loss account, was inconsistent, unfair, unreasonable and unacceptable.

C. The Determination and its Reasoning

5. In the Determination, the Commissioner rejected the objection raised by the Taxpayer and affirmed the Assessor's refusal to correct the Assessment under section 70A of the Ordinance. The Commissioner came to his determination for two reasons.

6. First, the Commissioner opined that the documents from the banks relating to the forward contracts in question (which were attached to the December 2015 Letter) are insufficient to establish that the Loss should be tax deductible. The Commissioner referred to the decision of the Court of Final Appeal in Nice Cheer (*supra*) and observed that for any unrealised loss to be used to reduce liability for profits tax, the diminution in value must be '*material and likely to be permanent*'. Since there was no evidence to show that the fair value changes on the forward contracts in question were material and likely to be permanent, the Commissioner concluded that the Loss is not an allowable deduction.

7. Second, the Commissioner further held that even if his conclusion above was wrong, he was in any event not satisfied that the Taxpayer had discharged the burden of proving that the Assessment is excessive by reason or an error or omission within the meaning of section 70A of the Ordinance. On this point, the Commissioner referred to the decision of Extramoney (*supra*) and observed that, for the purpose of section 70A, the '*error*' needs to be '*something incorrectly done though ignorance or inadvertence; a mistake*', does not cover a situation where '*a taxpayer has deliberately and consciously made a decision*'. On the evidence, the Commissioner concluded that the Taxpayer had deliberately and consciously made a decision not to account for the Loss in the Return, and therefore, the Taxpayer's application under section 70A of the Ordinance must fail in any event.

D. Taxpayer's Grounds of Appeal

8. In the notice of appeal dated 20 July 2016 issued by the Solicitors, the Taxpayer sought to appeal against the Determination on the following grounds:

(1) There was an 'arithmetic error' in the Tax Computation of which the

loss of forward contract should be included in the Tax Computation.

(2) The decision of Extramoney (*supra*) cited in the Determination is irrelevant because the fundamental question is that whether the Loss is tax deductible or not. Given that the Taxpayer had paid tax on the gain made in respect of similar forward contracts in the previous years of assessment, the loss on the forward contracts in question should be tax deductible. Disallowing the deduction of the Loss is inconsistent and unreasonable.

(3) Further, under the 'Profits Tax Return – Fair Value Accounting' section of the Department's website, it was expressly stated that the Department accepted assessable profits computed on a fair value basis. In the Financial Statements, the auditors made it clear in their qualified opinion that 'had the forward contracts been stated at fair value, [the Taxpayer] would have recognised an unrealised loss of HK$13,025,735 in the statement of income and retained earnings for the year'.

E. Discussions

9. As acknowledged by the Taxpayer's representative during the course of the appeal hearing, the two issues involved in this appeal are:

(1) Issue 1: Whether the Loss is shown to be deductible from the Taxpayer's Assessable Profits?

(2) Issue 2: If 'yes', whether such 'error' in the Tax Computation was such 'error' within the meaning of section 70A of the Ordinance?

10. Pursuant to section 68(4) of the Ordinance, the onus of proving that the assessment appealed against is excessive or incorrect is vested on the Taxpayer.

E1. Issue 1: Is the Loss deductible?

11. Section 2 of the Ordinance defines 'assessable profits' to mean:

'*... the profits in respect of which a person is chargeable to tax for the basis period for any year of assessment, calculated in accordance with the provisions of Part 4.*'

12. Under Part 4 of the Ordinance, section 16(1) of the Ordinance provides, amongst other things, that:

'*In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are incurred during the*

basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part for any period…'

13. The question on whether unrealised gains and losses are taxable or deductible was considered and authoritatively determined by the Court of Final Appeal in Nice Cheer (*supra*). In that case, following the introduction of new accounting standards, the taxpayer recorded changes in the value of unsold securities held at the end of the accounting periods in its profit and loss accounts. However, in computing its assessable profits and allowable deductions, the taxpayer excluded such unrealised gains but claimed deduction for unrealised losses. The Court of Final Appeal held that unrealised gains were not taxable profits.

14. In discussing the legal principles on tax law concerning unrealised profits and losses and their relationship with accounting principles, Lord Millet NPJ observed that:

'*21. There are two cardinal principles of tax law:* ***(i) the word "profits" connotes actual or realised and not potential or anticipated profits; and (ii) neither profits nor losses may be anticipated****. The two principles overlap and are often interchangeable, for they both involve questions of timing; but they are not identical. The first is concerned with the subject-matter of the tax, uses the word "anticipated" in its secondary meaning of "expected" or "hoped for", and excludes profits which have not been and may never be realised. The second is concerned with the allocation of profits to the correct accounting period, uses the word "anticipated" in its primary meaning of "brought forward", and prevents profits being taxed prematurely.*

…

27. In Duple Motor Bodies Ltd v Inland Revenue Commissioners Lord Reid had suggested that in relation to losses there was a long established though illogical exception to the cardinal principle that neither profits nor losses may be anticipated, in that the taxpayer could bring into his accounts at market value an article of trading stock which had fallen in value below cost and "in this way anticipate a future loss". The words "in this way" show that the process which Lord Reid was describing is not strictly an exception to the principle that neither profits nor losses may be anticipated; and for my part I do not consider that it is "quite illogical". ***Strictly speaking there is no exception to the rule that losses may not be anticipated.*** *If at the end of an accounting period the value of an item of trading stock is the same as or greater than cost but it is sold in the following accounting period for less than cost, the loss is realised in the later period and cannot be brought forward to the earlier. This is the case even if the loss is realised before the accounts are signed off, for post-*

> *balance sheet events are relevant and can be taken into account only if they affect the position as at the balance sheet date.*
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> *28.* ***If the market value of an item of trading stock which cost $100 is $120 at the end of year one and the item is sold in year two for $80, the application of ordinary principles of taxation means that for tax purposes in year one there is neither profit (because the profit has not been realised) nor loss (because the loss may not be anticipated); but there will be a loss of $20 in year two****. Under the new accounting standards, however, the taxpayer's financial statements will show a profit of $20 in year one and a loss of $40 in year two.*
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> *29.* ***But it does not follow that an unrealised loss cannot be used to reduce liability for profits tax. In a proper case this can be achieved by making provision in the profit and loss account for the diminution in the value of trading stock during the accounting period****. At first sight this seems to be merely another way of anticipating unrealised losses; but it is not.* ***The auditors will not normally allow such a provision to be made unless they are satisfied that the diminution in value is material and likely to be permanent****. Moreover, if such a provision is made it can be challenged by the Commissioner. The need for such a rule can be seen by considering the case where the trading stock includes shares in a company has become insolvent and the shares worthless. The taxpayer may properly write off the value of the shares by making an appropriate provision when the company is put into liquidation without waiting for the company to be dissolved.*
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> *...*
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> *34. It is a fundamental principle of the constitution of Hong Kong, as of England, Australia, the United States and other democratic societies, that the subject is to be taxed by the legislature and not by the courts, and that it is the responsibility of the courts to determine the meaning of legislation.* ***This is not a responsibility which can be delegated to accountants, however eminent. This does not mean that the generally accepted principles of commercial accounting are irrelevant, but their assistance is limited.***' (emphasis added)

15. It is, therefore, clear from Nice Cheer that for the Taxpayer to claim deduction based on the Loss (which is 'unrealised loss' arising from the fair value changes of its forward contracts in the year of assessment 2014/15), there must be evidence showing that such changes are 'material and likely to be permanent'. Although the generally accepted commercial accounting may be relevant for this purpose, its assistance is limited. At the end of the day, the Taxpayer has to satisfy this Board, with evidence, that the Loss was material and likely to be permanent at the year of assessment 2014/15.

16. Prior to the appeal hearing, directions were given to the parties to file and serve, amongst other things, witness statement(s) of fact on which a party seeks to rely in the appeal. No such witness statement had been filed by the parties.

17. Shortly before the appeal hearing, Ms A on behalf of the Taxpayer submitted a letter dated 26 April 2017 (the 'April 2017 Letter') setting out her explanation as to why she caused the Taxpayer to submit the Tax Computation despite her concern relating to the Loss.

18. In the April 2017 Letter, Ms A also expressed her disagreement with the finding at paragraph 3(5) of the Determination that 'there is no evidence that the ten contracts were trading stock of the [Taxpayer] held for resale or that the losses were on revenue account'. Ms A claimed that the Taxpayer had been using forward contracts to hedge RMB 2012, and the profits from hedging was used to decrease the cost of purchase and formed part of the Assessable Profits for the years of assessment 2012/13 and 2013/14.

19. Not only had the Taxpayer failed to file and serve any witness statement of Ms A prior to the appeal hearing, Ms A also did not appear at the appeal hearing. Given that the Commissioner's representative was not given any opportunity to question or test the credibility of the assertions made by Ms A in the April 2017 Letter, this Board does not consider it appropriate to give any weight to Ms A's assertions unless the same are borne out by the undisputed documents placed before this Board in this appeal.

20. On the question as to whether the Loss, being the fair value changes of the forward contracts, is deductible, the crux is whether in this appeal, the Taxpayer has adduced sufficient evidence to discharge its burden to show that such fair value changes were 'material and likely to be permanent' in the year of assessment 2014/15.

21. Apart from the qualified opinion of Company B expressed in the Financial Statements, the only relevant documents adduced by the Taxpayer on this subject are the two letters from the banks (namely, Bank C and Bank D) attached to the December 2015 Letter (see paragraph 4(8) above). These documents, in our opinion, are incapable of supporting a case that the fair value changes of the forward contracts in question were 'likely to be permanent' in the year of assessment of 2014/15.

22. Apart from Ms A's assertions in the April 2017 Letter, the Taxpayer had not submitted any evidence explaining the purpose of entering into each of the forward contracts in question, the terms of each of them, and the basis as to why the fair value changes of each of them were 'likely to be permanent' in the year of assessment in question. The fact that the Taxpayer had previously paid tax in respect of gains derived from forward contracts in previous years of assessment is, in our view, insufficient to support a case that the Loss arising from the fair value changes in respect of the forward contracts in question in the year of assessment 2014/15 is deductible loss under those legal principles laid down in Nice Cheer.

23. This Board takes note of the contents of the 'Profits Tax Return – Fair Value Accounting' section of the Department's website (see paragraph 4(13) above). We,

however, do not consider it assists the Taxpayer's case in this case:

(1) First, it was only an 'administrative measure' of the Department at the time. It does not change the law as laid down by the Court of Final Appeal in Nice Cheer as to what is required to be shown before an unrealised loss can be treated as deductible loss for the purpose of our tax law.

(2) Secondly, as an 'administrative measure', it gave a taxpayer an option to compute his assessable profits on a fair value basis. This, however, does not mean that a taxpayer who had submitted a tax computation on realization basis could claim that such tax computation was an error and, on that basis, seek deduction of such unrealised loss that was not permissible by our tax law.

24. For the above reasons, this Board is of the view that the Taxpayer is unable to discharge its burden to show that the Loss is deductible from the Taxpayer's Assessable Profits for the year of assessment 2014/15, and it therefore is unable to show any 'error' to support its application under section 70A of the Ordinance. For this reason alone, this appeal should be dismissed.

E2. Issue 2: Is there an error within the meaning of section 70A?

25. Out of abundance of caution, this Board will also discuss the issue as to whether (if contrary to our ruling) the Loss is deductible, whether the 'error' of the Taxpayer is such error that entitles the Taxpayer to reopen the Assessment under section 70A of the Ordinance.

26. Section 70 of the Ordinance provides that:

'*Where no valid objection or appeal has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income or profits or net assessable value assessed thereby, or where an appeal against an assessment has been withdrawn under section 68(1A)(a) or dismissed under subsection (2B) of that section, or where the amount of the assessable income or profits or net assessable value has been agreed to under section 64(3), or where the amount of such assessable income or profits or net assessable value has been determined on objection or appeal, the assessment as made or agreed to or determined on objection or appeal, as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income or profits or net assessable value.*'

27. Section 70A of the Ordinance provides that:

'*Notwithstanding the provisions of section 70, if, upon application made within 6 years after the end of a year of assessment or within 6 months after*

> *the date on which the relative notice of assessment was served, whichever is the later, it is established to the satisfaction of an assessor that the tax charged for that year of assessment is* ***excessive*** *by reason of* ***an error or omission in any return or statement submitted in respect thereof****, or* ***by reason of any arithmetical error or omission in the calculation of the amount of the net assessable value*** *(within the meaning of section 5(1A)), assessable income or profits assessed or in the amount of the tax charged, the assessor shall correct such assessment:*
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> *Provided that under this section no correction shall be made to any assessment in respect of an error or omission in any return or statement submitted in respect thereof as to the basis on which the liability to tax ought to have been computed where the return or statement was in fact made on the basis of or in accordance with the practice generally prevailing at the time when the return or statement was made.*' (emphasis added)

28. For the purpose of Section 70A, it was held by Patrick Chan J (as he then was) in Extramoney (*supra*) that the '*error or omission*' in this context refers to '*something incorrect done through ignorance or inadvertence, a mistake*'. In his judgment, the learned judge stated (at [1997] HKLRD 387 at 395E-396D) that:

> '*The burden is obviously on the taxpayer to show that the assessment was excessive by reason of an error or omission in the tax return or statement submitted by him. After all, they were his documents. MacDougall J. (as he then was) in Inland Revenue Appeal No.2 of 1985 said:-*
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> > *"If a taxpayer wishes to challenge the accuracy of his own audited statements and tax declarations made by a ... director,* ***it is not sufficient merely to say that ... a mistake was made ... Evidence to substantiate the mistake must be given in the strongest terms****."*
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> *There is no definition of "errors or omissions" in the Ordinance. But it is clear that not every error or omission falls within s.70A and is accepted for the purpose of this section.*
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> *...*
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> *In my view, for the purpose of s.70A, the meaning of "error" given in the* ***Oxford English Dictionary*** *(p.277) would be appropriate, that is,* ***"something incorrectly done through ignorance or inadvertence; a mistake". I do not think that a deliberate act in the sense of a conscientious choice of one out of two or more courses which subsequently turns out to be less than advantageous or which does not give the desired effect as previously hoped for can be regarded as an error within s.70A****. It is even worse if the deliberate act is motivated by fraud or dishonesty. But the question of fraud or dishonesty need not arise.*

> *Hence, in the context of the present case, if there is a change of opinion of the auditors or accountants in respect of the accounts, the first opinion cannot be regarded as an error or omission within the section. Similarly* ***if there is a change of mind of the directors of the company in connection with how any part of the accounts should be made up, the previous decision will not be regarded as an error or omission. Nor is it an error or omission if it is merely a difference in the treatment of certain items in the accounts by those preparing or approving the accounts. If this were permitted, the director or officer of a company will be tempted at a later stage to try and "improve" the company's accounts or change his own decisions if this is to his advantage****. This would be contrary to the spirit of the Ordinance that there should be finality in taxation matters. The whole statutory scheme provided in the Ordinance simply cannot work.*' (emphasis added)

29. The said definition given by Patrick Chan J (as he then was) to the words 'error or omission' was approved by the Court of Final Appeal in Moulin Global Eyecare Trading Ltd v CIR (2014) 17 HKCFAR 218 (at paragraphs 15 & 135).

30. In other words, the law is clear to the effect that for a taxpayer to succeed in re-opening an assessment under section 70A of the Ordinance, he has to adduce evidence to show that there was an 'error or omission', which was 'something incorrectly done through ignorance or inadvertence', but not 'a deliberate act in the sense of a conscientious choice of one out of two or more courses'.

31. On the evidence, the fair value changes of the forward contracts in question were clearly brought to the attention of the Taxpayer by the qualified opinion of Company B set out in the Financial Statements. Indeed, in the December 2015 Letter, the Taxpayer stated that

> '… At the time of issuance of audit report, [its] management and its auditors were in dispute regarding whether to state the forward contract at fair value or to make a provision. Given the pressing time pressure of tax deadline, [its] management, without insisting the tax representative to correct the accounts to provide the loss in relation to the forward contracts, submits the [Return] to meet the tax deadline. …'

32. Thus, it is clear from the December 2015 Letter that the Taxpayer was fully aware of the possibility of making provisions for and claiming deduction in respect of the Loss in the Financial Statements and the Tax Computation respectively, and that it did not do so because of the time pressure to meet the deadline for submission of the Return. This account is essentially repeated by Ms A in the April 2017 Letter.

33. At the appeal hearing, the Taxpayer's representative claimed that the Taxpayer only relied on the second limb of section 70A of the Ordinance, i.e. 'the year of assessment is excessive … by reason of any arithmetical error or omission in the calculation of the amount of the net assessable value'.

34. In our judgment, the evidence before this Board does not show any 'error or omission' that was 'incorrectly done through ignorance or inadvertence', let alone any 'arithmetical error or omission'. Instead, the evidence shows that the Taxpayer was fully aware of the issue and had made a deliberate choice of filing the Return on the basis that no deduction from its Assessable Profits was claimed in respect of the Loss. It might be the case that the Taxpayer was under some time pressure at the time. This, however, would not change what was a 'deliberate act' into an act 'incorrectly done through ignorance or inadvertence'.

35. For the above reasons, even if (contrary to our conclusion) the Loss is deductible from the Taxpayer's Assessable Profits for the year of assessment 2014/15, this Board is of the view that the Taxpayer has failed to discharge its burden to show that there was such 'error or omission' justifying the re-opening of the Assessment under section 70A of the Ordinance.

F. Deposition

36. For the reasons explained above, this Board dismisses the Taxpayer's appeal and confirms the Assessment. Since this appeal has no merit in it and that the Taxpayer has also failed to provide this Board with relevant evidence in support of this appeal, this Board consider appropriate to exercise its discretion to order the Taxpayer to pay $10,000 as costs of the Board.